

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANH VU NGUYEN,

Petitioner,

v.

JEFFREY UTTECHT,

Respondent.

CASE NO. C16-0292-JCC

ORDER

This matter comes before the Court on Petitioner Anh Nguyen’s objections (Dkt. No. 8) to the report and recommendation (Dkt. No. 7) by the Honorable James P. Donohue, United States Magistrate Judge and on Petitioner’s motion to strike (Dkt. No. 9). For the reasons explained herein, the report and recommendation (Dkt. No. 7) is ADOPTED, the objections (Dkt. No. 8) are OVERRULED, and the motion to strike (Dkt. No. 9) is DENIED.

I. BACKGROUND

Petitioner Anh Nguyen is a state prisoner currently incarcerated at the Coyote Ridge Corrections Center in Connell, Washington. (Dkt. No. 7 at 1.) On February 26, 2016, he filed a petition for writ of habeas corpus under 28 U.S.C. § 2241, challenging a 2002 judgment and sentence of the King County Superior Court. (Dkt. No. 1-1.)

Petitioner previously filed with this Court a petition under 28 U.S.C. § 2254 challenging the same judgment and sentence. (*See Nguyen v. Wingler*, C08-1580-RSL, Dkt. No. 5.) That

1 petition was dismissed on the merits. (*Nguyen v. Wingler*, C08-1580-RSL, Dkt. No. 38.)

2 Petitioner identifies the present petition as one filed under 28 U.S.C. § 2241; however,
3 Judge Donohue recommended that it be construed as a petition for writ of habeas corpus brought
4 pursuant to § 2254. (Dkt. No. 7 at 2.) In light of the previous § 2254 petition challenging the
5 same judgment and sentence, and because that petition was dismissed on the merits, Judge
6 Donohue concluded that the instant petition is successive. (*Id.*) The Ninth Circuit has not given
7 Petitioner the requisite authorization to file a successive habeas petition with the district court.
8 *See* 28 U.S.C. § 2244(b)(3)(A). Judge Donohue thus recommended the petition be transferred to
9 the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and Ninth Circuit Rule 22-3.
10 (Dkt. No. 7 at 2.)

11 Petitioner objects to the report and recommendation. (Dkt. No. 8.) Petitioner further
12 moves to strike the proposed transfer order. (Dkt. No. 9.)

13 **II. DISCUSSION**

14 Petitioner's objections address the merits of his underlying habeas petition, specifically
15 the issues of "ex post facto laws" and ineffective assistance of counsel. (Dkt. No. 8 at 1-8.)
16 Petitioner does not address the content of Judge Donohue's report and recommendation, *i.e.*,
17 whether the petition should be construed as a successive petition under § 2254, and whether the
18 Ninth Circuit has authorized a successive petition here. Likewise, Petitioner's motion to strike
19 focuses on Judge Donohue's failure to address the merits of his petition. (Dkt. No. 9 at 1-2.)
20 Importantly, though, the merits of the petition are not presently at issue; rather, the question is
21 whether this Court has jurisdiction to hear the petition. Following Judge Donohue's
22 recommendation, the Court concludes that it does not.

23 The Ninth Circuit has held that 28 U.S.C. § 2254 is the exclusive avenue for a state court
24 prisoner to challenge the constitutionality of his detention. *See White v. Lambert*, 370 F.3d 1002,
25 1009 (9th Cir. 2004) (overruled on other grounds by *Hayward v. Marshall*, 603 F.3d 546, 552–
26 54 (9th Cir. 2010) (en banc)). The Court thus construes the instant petition as one brought under

§ 2254. This Court is without jurisdiction to consider a successive petition until the Ninth Circuit Court of Appeals has authorized its filing. 28 U.S.C. § 2244(b)(3)(A). There is no showing that such authorization occurred here. Transfer to the Ninth Circuit is therefore appropriate.

III. CONCLUSION

For the foregoing reasons, the Court ADOPTS the report and recommendation (Dkt. No. 7), OVERRULES the objections thereto (Dkt. No. 8) and DENIES Plaintiff's motion to strike (Dkt. No. 9).

Petitioner's federal habeas petition is hereby TRANSFERRED to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and Ninth Circuit Rule 22-3. Petitioner is advised that this transfer does not of itself constitute compliance with 28 U.S.C. § 2244(b)(3) and Ninth Circuit Rule 22-3. Petitioner must still file a motion for leave to proceed in the Court of Appeals and make the showing required by 28 U.S.C. § 2244(b)(2).

The Clerk is directed to CLOSE this case and TRANSFER all original documents to the Ninth Circuit Court of Appeals. The Clerk shall, however, RETAIN copies of the petition, the report and recommendation, and this order. The Clerk is further DIRECTED to send a copy of this order to Petitioner and to the Honorable James P. Donohue.

DATED this 8th day of June 2016.

A handwritten signature in black ink, appearing to read "John C. Coughenour", written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE